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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AL C. PARKE, Warden,

Petitioner,

vs.

RICKY HAROLD RALEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

When a defendant challenges the constitutional validity of a prior conviction in sentencing proceedings:

1. Who has the burden of proof?

2. By what measure must validity or invalidity be proven?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that federal law permits a state to place the burden of proof of invalidity of prior convictions on the defendant. Further, *amicus* argues that preponderance of the evidence is the appropriate standard.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and

reliable determination of guilt and swift execution of punishment.

Consideration of prior convictions is an essential part of modern sentencing. Without such consideration, the first offender would be treated identically with the hardened criminal. Under the standard promulgated by the Sixth Circuit, prior convictions would be arbitrarily ignored based on the mere chance occurrence of the disappearance or destruction of the transcript, combined with the state's inability to prove *Boykin* compliance by "clear and convincing" evidence without the transcript. Whether a hardened criminal is sentenced appropriately would depend on a random factor totally irrelevant to his actual culpability. Such arbitrariness is contrary to the rights CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

April, 1992

Respectfully submitted,

KENT S. SCHEIDEGGER

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Criminal Justice Legal Foundation

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

Respondent Ricky Raley was indicted in 1986 for robbery and for being a persistent felony offender. The latter allegation, if proven, results in an enhanced sentence. Ky. Rev. Stat. § 532.080. The allegation was based on two guilty pleas from 1979 and 1981. App. Pet. Cert. A27.

Raley moved to suppress the two prior convictions. He testified that he could not remember whether the trial judge had advised him of his rights. Raley's 1979 defense lawyer verified his signature on a form certifying that he had fully explained Raley's rights to him in those proceedings. *Id.*, at A31. No similar documentation was introduced for the 1981 conviction. *Id.*, at A32.

The trial court denied the motion to suppress. The Kentucky Court of Appeals affirmed in an unpublished opinion. *Id.*, at A33. The Kentucky Supreme Court denied discretionary review. The federal district court

denied habeas corpus. *Id.*, at A22-A25. The Court of Appeals for the Sixth Circuit reversed. *Raley* v. *Parke*, 945 F. 2d 137 (1991). The Court of Appeals reaffirmed its holding in *Dunn* v. *Simmons*, 877 F. 2d 1275 (CA6 1989) that unavailability of a transcript places "the burden on the Commonwealth to prove that he knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent." *Raley*, 945 F. 2d, at 140. The Court of Appeals went on to hold that the *Dunn* burden had not been met as to the 1981 conviction. *Id.*, at 142.[1]

SUMMARY OF ARGUMENT

A motion to suppress prior convictions is a collateral attack. When a final judgment is collaterally attacked, the burden is generally on the attacker to prove his factual allegations by a preponderance of the evidence. This Court so held in the landmark case of *Johnson* v. *Zerbst*, and numerous cases have reaffirmed that holding.

The better reasoned cases from the federal appellate courts and the state courts place the burden of proof on the defendant in the circumstances of this case. Kentucky's rule of *Dunn* v. *Commonwealth* is more generous to the defendant than federal law requires.

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1. Because this case arose on federal habeas corpus, the Commonwealth could have argued that *Dunn* v. *Simmons* is a "new rule" under *Teague* v. *Lane*, 489 U. S. 288 (1989). No precedent binding on state courts incorporates the *Dunn* rule or dictates that result. However, the Commonwealth was aware of this argument and chose not to include it in the petition for certiorari, and the Court need not raise the issue *sua sponte*. *Collins* v. *Youngblood*, 111 L. Ed. 2d 30, 38, 110 S. Ct. 2715, 2718 (1990). *Amicus* respectfully suggests a note to this effect to avoid the implication that *Teague* would have been inapplicable if raised. Cf. Brief *Amicus Curiae* of the American Bar Association in *Wright* v. *West*, No. 91-542, at 21-22.

ARGUMENT

I. A motion to suppress or strike a prior conviction is a collateral attack on a final judgment.

A. Judgments: Void, Voidable, Erroneous and Correct.

Judgments are not cleanly divided into "valid" and "invalid" judgments. Instead, they lie along a spectrum of vulnerability. At one end of the spectrum is the judgment which is absolutely void. Normally the only defect severe enough to cause absolute voidness is a lack of jurisdiction. Imprisonment under such a judgment would itself be a crime. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

At the other extreme are the vast majority of judgments. They have been validly rendered by courts of competent jurisdiction in proceedings free of reversible error. Such judgments will be affirmed if they are appealed and will be enforced in the face of any collateral attack.

The middle of the spectrum consists of judgments rendered erroneously by courts of competent jurisdiction. These judgments differ from each other in their degree of vulnerability. Some types of errors may be attacked at some stages of the process but not at others. A judgment may have been entered after the erroneous admission of an important piece of evidence. Such a judgment would be reversible on appeal. In most cases, however, it would not be vulnerable to collateral attack.[2] If no appeal is taken or if the judgment is affirmed on appeal, even erroneously, the judgment is no longer subject to question.

More fundamental defects will result in a judgment being "voidable," i.e., subject to being set aside in a collateral attack such as habeas corpus. Such a judgment is nonetheless "valid" in the sense that executive officers

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2. This is true even if the ground for exclusion is the Fourth Amendment. Such a claim will not be considered on federal habeas if the state provides an opportunity for full and fair litigation of the claim. *Stone* v. *Powell*, 428 U. S. 465, 481-482 (1976).

may properly execute it until such time as it is actually set aside. The legislative branch may attach civil disabilities, enforceable by criminal sanctions, which also apply until the judgment is actually set aside. *Lewis* v. *United States*, 445 U. S. 55, 67 (1980) (firearm possession by felon).

The status of a judgment as "voidable" is not necessarily static. Upon successful completion of habeas corpus proceedings, the judgment becomes void rather than merely voidable. See *id.*, at 61, n. 5. On the other hand, the right to challenge a judgment may be lost by the passage of time, see Rule 9(a) of the Rule Governing Section 2254 Cases in the United States District Courts, or by the failure to invoke the usual appellate remedies, see *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986).

B. Voidable Judgments and Habitual Criminals.

The defendant's criminal history is an essential factor in any modern system of sentencing. Without consideration of prior convictions, the first offender would be treated identically with the incorrigible recidivist, a morally repugnant result. Thus, habitual criminal statutes "reflect[] widely established policies in the criminal law of this country." *Spencer* v. *Texas*, 385 U. S. 554, 555 (1967).

In Kentucky, "[a] persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony *after having been convicted of two (2) or more felonies*." Ky. Rev. Stat. § 532.080(3) (emphasis added). Where the prior judgment is voidable but not void, two separate questions arise. First, has a person whose prior convictions are voidable "been convicted" within the meaning of the statute? Stated differently, is the validity of the priors an element of the recidivist classification? Second, where the voidability of the priors is based on a constitutional claim, does that same claim present a constitutional barrier to the use of the prior convictions to enhance the subsequent sentence?

Lewis, *supra*, considered the statutory and constitutional issues separately in parts III and IV of the opinion. 445 U. S., at 60-68. In a case arising from a state statute, a

federal court *must* consider the issues separately. The statutory question is purely one of state law. The Kentucky Supreme Court is, of course, the final authority on construction of state statutes. By placing the initial burden on the defendant, *Dunn* v. *Commonwealth*, 703 S. W. 2d 874 (1986), the Kentucky Supreme Court necessarily held that validity of the prior is not an element which must be proven by the prosecution in its case in chief. See also *Curl* v. *Superior Court*, 51 Cal. 3d 1292, 1306, n. 8, 801 P. 2d 292, 300 (1990) (prior conviction of murder as "special circumstance" for death penalty; validity not an element).

The second question, however, is a federal constitutional question. Past cases have held that convictions obtained in violation of the right to counsel may be used to establish a firearms violation, *Lewis*, *supra*, but may not be used for recidivist sentencing, *Burgett* v. *Texas*, 389 U. S. 109 (1967), consideration in a discretionary sentencing system, *United States* v. *Tucker*, 404 U. S. 443 (1972), or impeachment, *Loper* v. *Beto*, 405 U. S. 473 (1972). *Marshall* v. *Lonberger*, 459 U. S. 422 (1983) seems to imply a *Burgett* limitation on guilty pleas obtained in violation of the rule of *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

Assuming that *Burgett* applies to this case, what is the nature of a motion to suppress an otherwise admissible conviction on the ground that its use would violate a federal constitutional right? *Lewis* referred to such a motion as a collateral attack. 445 U. S., at 67. So did *United States* v. *Mendoza-Lopez*, 481 U. S. 828, 839 (1987). So has the United States Sentencing Commission. *Guidelines Manual* § 4A1.2, Commentary, last para., 271 (1991 ed.). *Amicus* submits that this characterization is correct.

The usual rule of litigation is that a final judgment settles the matter for all time between the parties. Judgment was rendered against Raley by courts of competent jurisdiction that he committed the prior offenses. Those judgments would normally be conclusive. Any claim that they are not conclusive made in this new proceeding is, by definition, a collateral attack on those

judgments. See Black's Law Dictionary 261, cl. 2 (6th ed. 1991).

As we will show in the next part, the usual rule is that the party collaterally attacking a judgment has the burden of proof. As a matter of state law, a state may alter this rule to the defendant's benefit. Kentucky has permitted the defendant to shift the burden to the state upon the mere production of evidence. *Dunn* v. *Commonwealth*, *supra*, 703 S. W. 2d, at 876. For drunk driving cases, the California Legislature has placed on the prosecution a burden of proof beyond a reasonable doubt. Cal. Veh. Code § 41403. State-imposed burdens, however, are no concern of a federal court on habeas corpus. *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991); *Oyler* v. *Boles*, 368 U. S. 448, 456-457 (1962). The only question is whether the state procedure fell below the federal constitutional minimum. The state is within its rights to place on the defendant the same burden of proof as the challenger bears in any other collateral attack.

II. In a collateral attack, the attacker has the burden of proof by a preponderance of the evidence.

For as long as collateral attacks on judgments of courts of general jurisdiction have been allowed, the burden has always been on the person challenging the judgment. "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." *Voorhees* v. *Jackson*, 10 Pet. (35 U. S.) 449, 472 (1836). This principle remains well settled today.

A. Supreme Court Cases.

Because the *Boykin* rule is a rule involving waiver of rights, it is best to begin with the classic case of *Johnson*

v. *Zerbst*, 304 U. S. 458 (1938).[3] Johnson had been convicted in a federal court for counterfeiting. *Id.*, at 459. He had not been represented by counsel. Although he had not specifically requested counsel from the court, *id.*, at 460-461, he claimed not to have waived counsel.

Against the government's contention that Johnson had waived his right by failure to request counsel, Justice Black wrote his now-famous pronouncement for the Court:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.*, at 464 (footnotes omitted).

Taken alone, this passage might be taken to imply that the "presumption against waiver" shifts the burden of proof to the government to prove nonwaiver. Justice Black dispelled this misconception in no uncertain terms.

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, *the burden of proof rests upon him* to establish that he did not competently

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3. Most of the cases discussed in this section involve the right to counsel. The defendant's burden on a *Boykin* claim should be *at least* as high as it is on a right to counsel claim. See *People* v. *Sumstine*, 36 Cal. 3d 909, 922, 687 P. 2d 904, 913 (1984).

and intelligently waive his constitutional right to assistance of counsel.

* * *

"*If petitioner fails to sustain this burden, he is not entitled to the writ.*" *Id.*, at 468-469 (emphasis added, footnotes omitted).

In subsequent habeas corpus cases, this Court repeatedly reaffirmed the rule of *Johnson* v. *Zerbst*: the burden is on the petitioner to prove his factual allegations by a preponderance of the evidence. *Walker* v. *Johnston*, 312 U. S. 275, 286 (1941); *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945); *Darr* v. *Burford*, 339 U. S. 200, 218 (1950), overruled on other grounds in *Fay* v. *Noia*, 372 U. S. 391, 435 (1963); *Brown* v. *Allen*, 344 U. S. 443, 458, n. 6 (1953).

United States v. *Morgan*, 346 U. S. 502 (1954) placed the burden of proof on a petitioner in circumstances similar to the present case. Morgan was convicted in federal court, served his sentence, and received a heavier sentence for a subsequent state offense because of the prior federal conviction. *Id.*, at 503-504. He sought federal coram nobis to challenge the prior conviction under *Johnson* v. *Zerbst*. *Morgan*, 346 U. S., at 504. The Court allowed the coram nobis hearing to proceed, but placed the burden of proof squarely on the petitioner. "Of course, the absence of a showing of waiver from the record does not of itself invalidate the judgment. It is presumed the proceedings were correct and *the burden rests on the accused to show otherwise*." *Id.*, at 512 (emphasis added).

In *Moore* v. *Michigan*, 355 U. S. 155, 156 (1957), the petitioner claimed, on state collateral review, that although he had waived counsel his waiver was not knowing and intelligent. The Court followed *Johnson* v. *Zerbst*, *supra*, holding that "the petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." 355 U. S., at 161-162.

In *Carnley* v. *Cochran*, 369 U. S. 506 (1962), the petitioner affirmatively alleged that he had requested

counsel, and the return did not allege an express waiver of counsel. *Id.*, at 516, n. 10. Nevertheless, the state supreme court presumed a waiver from the mere fact of defendant's appearance at trial without counsel, and denied habeas corpus without a hearing. *Id.*, at 513. The United States Supreme Court held this presumption impermissible.

> "Nor is it an answer to say that he may counter such presumptions on collateral attack by showing—if he can—that he had not in fact agreed, or been willing, to be tried without counsel. To cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we laid down in *Johnson* v. *Zerbst*, 304 U. S. 458, 464-465 . . . ." *Id.*, at 514.

This language might, on its face, support the notion that the burden of proving waiver is on the government, but a closer examination reveals that *Carnley* makes no such holding. First, the opinion itself declares absolute fidelity to *Johnson* v. *Zerbst*, which unequivocally places the burden on the petitioner.[4] More importantly, the Court treated this case as one of undisputed facts. Between the petitioner's allegation that he requested counsel and the absence of any allegation of waiver in the return, nonwaiver was established by the pleadings. *Id.*, at 516, n. 10. Under these circumstances, there is no burden of proof issue. The statement quoted is *dictum* and does not overrule the clear holdings of *Johnson*, *Morgan*, and *Moore*.

In *Burgett* v. *Texas*, 389 U. S. 109, 112 (1967), the record of the prior conviction from Tennessee stated that the defendant appeared "in proper person and without Counsel." The Court stated "the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel. . . . " *Id.*, at 114. It seems most unlikely that the Supreme Court would so casually overrule the square holding of a land-

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4. See *ante*, at 7-8.

mark case like *Johnson* v. *Zerbst*, *supra*, and these two holdings should be reconciled, if possible.

Johnson v. *Zerbst* placed the burden on the petitioner because of the presumption of regularity. 304 U. S., at 468-469. As a federal defendant, Johnson had an established constitutional and statutory right to counsel at the time of his 1934 trial. See *Powell* v. *Alabama*, 287 U. S. 45, 73 (1932). It seems appropriate to presume that the federal district judge did his duty under the Sixth Amendment and the federal statute, absent proof to the contrary. At the time of Burgett's trial in Tennessee, however, the Sixth Amendment was not applicable to the states. *Betts* v. *Brady*, 316 U. S. 455, 461 (1942), overruled in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). There is no basis for presuming that the state trial judge obtained a waiver of a right which Burgett did not then possess. It is quite logical to presume he did not. In *Loper* v. *Beto*, 405 U. S. 473 (1972), the plurality explicitly relied on this logic: "And the fact that the challenged convictions occurred . . . [before *Gideon*] would make any such finding [of waiver of counsel] highly unrealistic . . . . For, at the time of the petitioner's previous convictions, there was no known constitutional right to be 'waived.' " *Id.*, at 479, n. 6. This footnote is a response to Justice Rehnquist's dissent, and it does not challenge his assertion that *Johnson* v. *Zerbst* generally places the burden of proof on the petitioner. See *id.*, at 499-503 (Rehnquist, J., dissenting).

The *Burgett* "presumption" is thus a product of the unusual circumstance of a retroactive decision invalidating convictions obtained under procedures which were legal at the time, undercutting the basis of the usual presumption of regularity. The prior guilty pleas in the present case were taken long after *Boykin*, and therefore the usual rule of *Johnson* v. *Zerbst* should apply.

Recent Supreme Court cases contain little discussion of the burden of proof on collateral attack. The *Johnson* v. *Zerbst* rule appears to be so well settled that no discussion is needed. The only recent word we have found is an approving citation of *Moore* v. *Michigan*, *supra*, in *Colorado* v. *Connelly*, 479 U. S. 157, 168-169 (1986) (reaffirming

the preponderance of the evidence standard in *Miranda* cases).

B. Other Authorities.

1. Federal courts of appeals.

In rejecting the Commonwealth's attack on *Dunn* v. *Simmons*, the Sixth Circuit drew a distinction which, *amicus* submits, is without a difference. It dismissed as "irrelevant" all cases dealing with whether a prior conviction can be counted under the federal Sentencing Guidelines. *Raley* v. *Parke*, 945 F. 2d 137, 141 (1991). On the contrary, such cases are quite relevant. *United States* v. *Tucker*, 404 U. S. 443, 449 (1972) applied the rule of *Burgett* v. *Texas*, 389 U. S. 109, 114 (1967) to the discretionary sentencing regime that existed before the Guidelines. The implication of *Tucker* is that the manner in which the sentencing system uses prior convictions is irrelevant. A prior conviction either can be constitutionally used in sentencing or it cannot. Whether the use is in a recidivist statute, as in *Burgett* and the present case, a discretionary system, as in *Tucker*, or a guideline system, as in some of the more recent federal cases discussed in this section, the same rule applies. If federal courts applying the Guidelines can constitutionally impose the burden of proof on the defendant, a state court can surely do the same.

Indeed, to the extent that state and federal cases differ, that difference weighs in favor of the state. This Court has a general supervisory power over federal courts but not state courts. *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967). The two Due Process Clauses are worded identically. U. S. Const. amend. V; *id.*, amend. XIV, § 1. Any procedure for determining the validity of a prior conviction which is constitutional in a federal trial in federal district court necessarily meets the federal constitutional minimum for state trials. There is another distinction, however, which does make a difference but is frequently overlooked. It is important to distinguish between those cases where the record is available but shows no *Boykin* compliance, on the one hand, and the "lost transcript"

cases on the other. Most statements about a "silent record" placing a burden on the government fall into the former category.

Typical of the former is *Roddy* v. *Black*, 516 F. 2d 1380 (CA6 1975). In that case there were two indictments. The transcript was available, and "it appears that the trial judge asked Appellant whether he was willing to plead guilty to 'assault and battery' on both indictments, but convicted him of assault and battery on only one and of immoral and indecent practices on the other." *Id.*, at 1385. Given this state of the record, the state was permitted to prove the plea was knowing and intelligent, but only by clear and convincing evidence. *Id.*, at 1384, 1386.

United States v. *Pricepaul*, 540 F. 2d 417 (CA9 1976)[5] is similar. The record of the prior in *Pricepaul* consisted of a detailed minute order in a California case. The order described the waivers obtained, but the *Boykin* waivers were not among them. *Id.*, at 419, n. 2. The court held that defendant's submission of this record was sufficient to shift the burden to the government. *Id.*, at 424. *Sena* v. *Romero*, 617 F. 2d 579 (CA10 1980) and *Todd* v. *Lockhart*, 490 F. 2d 626 (CA8 1974) are also frequently cited for the proposition that an available transcript showing noncompliance with *Boykin* on its face shifts the burden to the government.

The second and more apposite group is the "lost transcript" line of cases, beginning with *Clayton* v. *Blackburn*, 578 F. 2d 117 (CA5 1978). Clayton contended on habeas corpus that the trial judge had not complied with *Boykin*. The facts regarding Clayton's conviction were quite similar to those of Raley's 1981 prior. No transcript was available, and Clayton himself could not clearly remember whether he had been advised of his rights. *Id.*, at 118-119. The court held Clayton's showing insufficient.

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5. *Pricepaul* was effectively overruled on other grounds by *Lewis* v. *United States*, 445 U. S. 55 (1980). See *United States* v. *Goodheim*, 651 F. 2d 1294, 1297 (CA9 1981).

> "The purpose of *Boykin* hearings, besides protecting defendants, is to help assure the finality of state court convictions in order to avoid collateral hearings in which memories become hazy and the evidence uncertain. Where no transcript is made or available of a guilty plea hearing, that purpose is obviously frustrated. [Citation.]
>
> "However, *it is still the petitioner's burden* in a habeas proceeding to demonstrate, at least prima facie, those facts that establish a constitutional violation." *Id.*, at 120 (emphasis added).

Clayton is different from *Roddy*, *Pricepaul*, *Sena*, and *Todd*. Instead of a record showing noncompliance on its face, which makes the petitioner's *prima facie* case, there is no record at all. At least where the lack of a record is not due to government misconduct, that leaves the burden where it originally rested: on the party challenging the validity of the judgment. The *Clayton* rule was reaffirmed in *Walker* v. *Maggio*, 738 F. 2d 714 (CA5 1984). The court held unequivocally that the burden was on the petitioner. *Id.*, at 716-717. The Fifth Circuit followed *Walker* in a similar federal case, *United States* v. *Woods*, 870 F. 2d 285, 287 (1989).

The lead opinion in *Honeycutt* v. *Ward*, 612 F. 2d 36 (CA2 1979) took a similar view. A prior used to enhance the sentence was attacked on *Gideon* grounds, and the only evidence was the minute order and Honeycutt's own testimony. *Id.*, at 39. Reversing the trial court's grant of habeas corpus, the lead opinion stated "the burden of proof is on Honeycutt to overcome the strong presumption of regularity in state judicial proceedings. His own self-serving declarations do not meet this burden." *Id.*, at 41.

The Seventh Circuit adopted a slightly different approach in *United States ex rel. Grundset* v. *Franzen*, 675 F. 2d 870 (1982). According to the *Grundset* court, the petitioner must first make a *prima facie* case of a constitutional violation. *Id.*, at 877 (citing *Clayton* and *Todd*). If he does, "the burden shifts to the State to show the voluntariness of the plea." *Id.*, at 878 (citing *Sena*,

Pricepaul and *Todd*). The burden-shifting language is *dictum*, however, as the holding of the case is that Grundset did not meet his initial burden. *Id.*, at 879. The Eleventh Circuit adopted a burden-shifting rule in *Fox* v. *Kelso*, 911 F. 2d 563, 570 (1990).

In 1984, Congress passed the Sentencing Reform Act which created a Sentencing Commission with broad authority to revamp federal sentencing. See generally, *Mistretta* v. *United States*, 488 U. S. 361, 367-370 (1989). As originally promulgated, the Sentencing Guidelines authorized the defendant to attack the validity of his priors but placed the burden of proof squarely on him. "Any other sentence [other than those previously vacated] resulting in a valid conviction is to be counted in the criminal history score. Convictions *which the defendant shows* to have been constitutionally invalid may not be counted in the criminal history score." United States Sentencing Commission, *Guidelines Manual* § 4A1.2, App. Note 6, 203 (1987 ed.) (emphasis added).[6]

Federal courts applying this Guideline have found no impediment to carrying it out as written. *United States* v. *Dickens*, 879 F. 2d 410, 411-412 (CA8 1989) (preponderance burden on defendant); *United States* v. *Davenport*, 884 F. 2d 121, 124 (CA4 1989); *United States* v. *Unger*, 915 F. 2d 759, 761 (CA1 1990).

In *United States* v. *Newman*, 912 F. 2d 1119 (1990), the Ninth Circuit rejected both its "burden-shifting" language from *Pricepaul*, *supra*, and its "clear and convincing" *dictum* from *United States* v. *Goodheim*, 686 F. 2d 776, 777 (1982). Both were overridden by the Guidelines. *Newman*, 912 F. 2d, at 1122, nn. 3-4. If a standard can be overridden by the Guidelines, that standard must not be constitutionally mandated. Whatever authority the Sentencing Commission may have, it certainly cannot amend the Constitution. If a standard is not constitution-

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6. The Application Note has since been amended to be even harder on defendants challenging their priors. See *United States* v. *Hewitt*, 942 F. 2d 1270, 1276 (CA8 1991).

ally mandated, there is no legitimate basis for imposing it on the states. *Spencer*, *supra*, 385 U. S., at 564.

In *Dunn* v. *Simmons*, 877 F. 2d 1275, 1278 (1989), the Sixth Circuit castigated the Kentucky Supreme Court for violating "federal standards" by placing a mere burden of *producing evidence* on a defendant who challenged his prior conviction on *Boykin* grounds. Yet in *United States* v. *Bradley*, 922 F. 2d 1290, 1297 (1991), the Sixth Circuit followed the other circuits in imposing the greater burden of *proof* on a federal defendant making the same claim. Then the present case reaffirmed *Dunn* despite *Bradley*. *Raley*, *supra*, 945 F. 2d, at 141. The Sixth Circuit seems oblivious to the absurdity of imposing a "federal" standard on the co-equal state judiciary *more* stringent than the standard the same court imposes on its own subordinate district courts.

Another line of cases involves the Armed Career Criminal Act, 18 U. S. C. § 924(e). A felon in possession of a firearm who would otherwise be sentenced to 10 years or less will instead be sentenced to 15 years or more, without probation or parole, if he has been convicted of 3 violent felonies or serious drug offenses. *Ibid.*; cf. *id.*, subd. (a)(2). Applying this statute, the Seventh Circuit held in *United States* v. *Gallman*, 907 F. 2d 639, 644 (1990) (emphasis in original) that "[t]he lack of explicit proof that Gallman was aware of his constitutional rights does not prove that he was unaware of those rights. The burden is on Gallman to provide evidence *showing* that his earlier conviction was unconstitutional." *Gallman* was followed in *United States* v. *De Forest*, 946 F. 2d 523, 526 (CA7 1991).

In summary, the overwhelming weight of federal authority supports a preponderance standard of proof, with the initial burden of proving at least a *prima facie* case on the defendant. In *every* circuit other than the Sixth which has squarely considered the question, the Kentucky procedure would be upheld. Furthermore, federal criminal cases have dropped even the "burden-shifting" approach and simply stated that the defendant

has the burden of proving invalidity. As we will show below, this is the preferable approach.

2. Federal statute.

A statute enacted by Congress for the sentencing of repeat offenders in federal courts is, of course, not controlling of the present question. Nonetheless, the opinion of the branch of government specifically charged with the enforcement of the Fourteenth Amendment, U. S. Const. amend. XIV, § 5, as to what process is due surely deserves great weight in evaluating Raley's federal due process claim.

In sentencing proceedings for drug offenders, Congress has provided a procedure for challenging the validity of the priors. 21 U. S. C. § 851. The statute is crystal clear. "The person [challenging the prior judgment] shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." *Id.*, subd. (c)(2).[7]

3. State courts.

In *People* v. *Harris*, 61 N. Y. 2d 9, 459 N. E. 2d 170 (1983), the New York Court of Appeals held that once the fact of the prior conviction is proven, defendant bears the burden of *proving* its unconstitutionality. *Id.*, at 15, 459 N. E. 2d, at 172.[8] Texas also places the burden of proof on the defendant, at least with respect to right-to-counsel claims.[9] *Disheroon* v. *State*, 687 S. W. 2d 332, 334 (Tex. Crim. App. 1985).

The Utah Supreme Court provided a survey of state decisions in a right-to-counsel case, *State* v. *Triptow*, 770 P. 2d 146 (Utah 1989). *Triptow* identified three divergent

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7. The "response" is the defendant's pleading asserting the invalidity. *Ibid.*

8. Although the decision refers to a statute, *ibid.*, the text of that statute does not answer the question. See N. Y. Crim. Proc. L. § 400.21, subd. 7(b).

9. See note 3, *ante*, at 7.

views: (1) placing the burden of proof of unconstitutionality on the defendant by a preponderance of the evidence; (2) requiring the prosecution to prove representation or waiver by at least a preponderance as part of its case in chief; and (3) placing the burden of production of evidence on the defendant but shifting the burden of persuasion to the state upon the defendant's production of any evidence. *Id.*, at 148. The Utah court identifies Florida, New Jersey, and Rhode Island as being in the first group;[10] Hawaii, Kansas, and Ohio as being in the second; and Indiana, Maryland, and North Carolina as being in the third. *Ibid.* The *Triptow* court joins the third group, *id.*, at 149, and Kentucky did the same in *Dunn* v. *Commonwealth*, 703 S. W. 2d 874, 876 (1986).

One of the most thorough analyses in the case law to date is that of the California Supreme Court in *Curl* v. *Superior Court*, 51 Cal. 3d 1292, 801 P. 2d 292 (1990). Curl was accused of murder with the "special circumstance" of prior conviction of murder. No transcript of the plea colloquy on the prior was available. However, there was a minute order reflecting advisement and waiver, and the trial judge and defense counsel from the prior case testified regarding their habit and custom of advising defendants in plea proceedings. The trial court denied the motion to strike the prior, finding that the prosecution had proven compliance with *Boykin-Tahl*[11] by clear and convincing evidence, but the court noted that Curl would have prevailed had the standard been proof beyond a reasonable doubt. *Id.*, at 1296-1298, P. 2d at 293-295.

Following the same pattern which this Court followed in *Lewis* and *Mendoza-Lopez*, see *ante*, at 4-5, the *Curl* court first determines as a matter of statutory construction

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10. As discussed above, we would also include New York and Texas.

11. *In re Tahl*, 1 Cal. 3d 122, 460 P. 2d 449 (1969) was California's stringent interpretation of *Boykin* in effect at the time. It has since been overruled. *People* v. *Howard*, 1 Cal. 4th 1132, 1178, ___ P. 2d ___, ___ (1992).

that validity of the prior was not an element of the special circumstance. 51 Cal. 3d, at 1299-1302, 801 P. 2d, at 295-297.[12] *Curl* then proceeds to the constitutional analysis. Relying largely on this Court's precedents discussed in part II A, *ante*, at 6-11, *Curl* concludes that the defendant has the burden of proof. *Id.*, at 1305, P. 2d, at 299.

Curl also rejects the notion of shifting burdens in motions to strike prior convictions on constitutional grounds. The procedure laid out in *Curl* is straightforward. The prosecution has the burden of proving the fact of the prior conviction. The magnitude of that burden is set by state law. A defendant who argues that a prior conviction cannot be constitutionally used despite the fact of its existence bears the burden of proving the factual basis of that claim. *Id.*, at 1306-1307, P. 2d, at 300. "[T]he burden of proof on [validity of the prior] shall remain with the defendant." *Id.*, at 1307, P. 2d, at 300; cf. Rule 301 of the Federal Rules of Evidence. The magnitude of the burden, *Curl* went on to hold, was preponderance of the evidence, based on state evidence law, *Johnson* v. *Zerbst*, *supra*, and *Lego* v. *Twomey*, 404 U. S. 477 (1972). *Curl*, 51 Cal. 3d, at 1305-1306, 801 P. 2d, at 299-300.

C. Silent Records v. Missing Records.

> " 'Is there any other point to which you would wish to draw my attention?' [said the inspector.]
>
> " 'To the curious incident of the dog in the night-time.'
>
> " 'The dog did nothing in the night-time.'
>
> " 'That was the curious incident,' remarked Sherlock Holmes."

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12. The intermediate appellate court had construed the statute to include constitutional validity in the "truth" of the prior murder circumstance, thus entitling the defendant to both jury trial and proof beyond a reasonable doubt. See *id.*, at 1298-1299, P. 2d, at 295; *id.*, at 1307-1309, P. 2d, at 301-303 (Mosk, J., concurring in the judgment).

> A. Doyle, *The Adventure of Silver Blaze, The Memoirs of Sherlock Holmes* (1894), reprinted in *The Original Illustrated Sherlock Holmes* 196-197.

In a modern guilty plea proceeding, we expect the transcript to show the *Boykin* advisements and waivers. If the transcript is available and makes no mention of these things, that "silence" is like the failure of Holmes's dog to bark. It is a "curious incident" indicating a likelihood that proper procedures were not followed. See *Sena* v. *Romero*, 617 F. 2d 579, 580-581 (CA10 1980). "It [is] error, *plain on the face of the record* for [a] trial judge to accept [a defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969) (emphasis added).

On the other hand, where the transcript is not available and the circumstances of its disappearance are unremarkable, the "silence" implies nothing at all. Had no one been around to hear whether the dog barked or not, the incident would not have been the least bit curious. Absence of evidence, when properly explained, is not evidence of absence. Once this distinction is recognized, the key cases drop into place.

A defendant can make a *prima facie* case by submitting a record of the proceeding where the "affirmative showing" described in *Boykin* would normally be recorded, but which does not contain such a showing. Most of the cases "shifting" the burden to the state in such circumstances are merely holding that the presumption of regularity is not conclusive, and that a record which is silent where the showing would normally be found is sufficient to rebut the presumption and establish the defendant's *prima facie* case. See *Todd* v. *Lockhart*, 490 F. 2d 626, 628-629 (CA8 1974); *United States* v. *Pricepaul*, 540 F. 2d 417, 424 (CA9 1976); *Roddy* v. *Black*, 516 F. 2d 1380, 1384 (CA6 1975); *Sena* v. *Romero*, *supra*, 617 F. 2d, at 580-581.

If no transcript is available, that unavailability is not evidence for either side. The burden remains with the defendant to show, with whatever evidence is available, that the earlier proceeding did not meet constitutional requirements. If he succeeds in proving a *prima facie*

case, the ball is *effectively* in the prosecution's court. See *Walker* v. *Maggio*, 738 F. 2d 714, 717 (CA5 1984); *United States* v. *Dickens*, 879 F. 2d 410, 412 (CA8 1989); *People* v. *Harris*, 61 N. Y. 2d 9, 15, 459 N. E. 2d 170, 172 (1983). This should not be thought to be a shift in the burden of persuasion, however, but simply a recognition that a *prima facie* case requires judgment in favor of the party making it, absent an effective rebuttal. See *Kelly* v. *Jackson*, 6 Pet. (31 U. S.) 622, 632 (1832).

The correct rule, *amicus* submits, is the one adopted by the federal courts in the Guidelines and Armed Career Criminal Act cases and by New York, Texas, and California: the burden is on the defendant by the preponderance of the evidence both initially and finally. This rule is consistent with the precedents established in *Johnson* v. *Zerbst*, *United States* v. *Morgan*, and *Moore* v. *Michigan*. See *ante*, at 6-8.

The rule adopted by the Seventh Circuit in *Grundset* and the Eleventh Circuit in *Fox*, shifting the burden upon *prima facie* proof by defendant, is a needless complication with little practical effect. If the defendant produces no evidence or insufficient evidence, the state prevails. See *Grundset*, *supra*, 675 F. 2d, at 879. If the defendant presents sufficient evidence and the state produces none, the defendant prevails. If both sides produce adequate evidence, the one with the stronger case prevails. The allocation of the ultimate burden of persuasion under a preponderance standard makes relatively little difference in this situation. The allocation decides the issue only when the evidence is so evenly balanced that the fact-finder is unable to find that the evidence on either side of an issue preponderates, something which rarely happens. See C. McCormick, *Evidence* § 307, at 639, n. 2 (1st ed. 1954).

The rule adopted by Kentucky and Utah, shifting the burden upon production of *any* evidence by the defendant, violates the rule of *Johnson* v. *Zerbst*, gives too little respect to the dignity of courts and judgments, and invites perjury in cases where defendant has nothing to lose. States may adopt such rules if they choose, but nothing in

the federal Constitution or this Court's precedents compels such a procedure. The rule adopted by the Sixth Circuit, placing the burden on the prosecution to prove the validity of the judgment *without* any evidence against validity, is patently erroneous.

Applying the rule of *Dunn* v. *Commonwealth*, *supra*, the state court evaluated the evidence under a standard more generous to the defendant than federal law requires. Under 28 U. S. C. § 2254(d) as construed in *Marshall* v. *Lonberger*, 459 U. S. 422, 435 (1983), the District Court was required to defer to the state court's factual findings. The District Court properly denied habeas corpus.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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